NO. 80-1437

Office-Supreme Court, U.S.
FILED
JUL 11 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE,
Petitioner

VERSUS

ARTHUR EDWARD SHEEHAN,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Ira E. Tobolowsky

TOBOLOWSKY & FRIEDMAN
600 Carillon Tower West
13601 Preston Road
Dallas, Texas 75240

ATTORNEYS FOR RESPONDENT

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1437

ARMY AND AIR FORCE EXCHANGE SERVICE,
Petitioner

VERSUS

ARTHUR EDWARD SHEEHAN
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Whether the District Court possesses subject matter jurisdiction under the Tucker Act, 28 U.S.C. §1346 (a) (2) to hear an action brought by a former employee against the Army and Air Force Exchange Service for monetary relief predicated upon an expressed or implied contract of employment.

CERTIFICATE OF INTERESTED PARTIES

The undersigned, attorneys of record for Respondent Arthur Edward Sheehan, certify that the following listed parties have an interest in the outcome of this case:

Arthur Edward Sheehan
Army and Air Force Exchange Service

TABLE OF CONTENTS

Page

Questions Presented i

Certificate of Interested Parties ii

Opinion Below 1

Jurisdiction 1

Statute and Regulations Involved 1

Statement 6

Reasons for Denying the Petition 8

Summary 14

Certificate of Service 15

TABLE OF AUTHORITIES

Page

Cases:

Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967), cert denied 399 U.S. 911 (1970) 12

Hatzlachh Supply Co., Inc. v. United States, 444 U.S. 460 (1980) 14

Keetz v. United States, 168 Ct. Cl. 205 (1964) 9

United States v. Hopkins, 427 U.S. 123 (1976) .8, 9, 10, 12, 14

United States v. Testan, 424 U.S. 392 (1976) 8, 12, 14

Young v. United States, 498 F.2d 1211 (5 Cir., 1974) 10

Statutes:

5 U.S.C. §702 .....8, 9

28 U.S.C. § 1254(1) 1

28 U.S.C. §1331(a) 8, 9

28 U.S.C. § 1346(a) (2) .....i, 1, 8, 9

Regulations:

Army Regulation No. 60-21/Air Force Regulation No. 147-15 (November 12, 1974) 2, 6

OPINION BELOW

The Opinion of the court of appeals (Petitioner's Appendix A, 1a-16a) is reported at 619 F.2d 1132.

JURISDICTION

The Judgment of the court of appeals (Petitioner's Appendix C, 18a-19a) was entered on June 27, 1980. A Petition for Rehearing was denied on September 26, 1980 (Petitioner's Appendix D, 20a-21a). On December 18, 1980, Justice Powell extended the time for filing a Petition for Writ of Certiorari to and including February 23, 1981. Thereafter, the Clerk of the Court extended the time for respondent to file this brief in opposition to the Petition for Writ of Certiorari to and including July 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. §1346(a)(2), provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph,

an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

ARMY REGULATION NO. 60-21/AIR FORCE REGULATION NO. 147-15 (Nov. 12, 1974) provides in pertinent part:

Section II. EXECUTIVE MANAGEMENT PROGRAM

5-6. Purpose. The Executive Management Program (EMP) is intended to fulfill the continuing requirement of AAFES for highly qualified and dedicated executive employees who will be readily available to meet the worldwide executive personnel requirements of AAFES.

5-7. Executive Management Program definitions. a. EMP positions are positions so designated by the Commander, AAFES, to include all positions in the entry EMP grade level and above and such other positions as are necessary or suitable for the training and development of individuals for attainment of the EMP grade level.

b. An EMP employee is a United States citizen employee designated an EMP employee by the Commander, AAFES, who has acknowledged in writing that he understands and accepts the conditions of the EMP, as prescribed by the Commander, AAFES.

5-8. Nomination and designation to EMP status. Procedures for nomination, selection, and designation to EMP status will be as published by the Commander, AAFES. Entry grade level for EMP status will be established by the Commander, AAFES, subject to the approval of the Board of Directors. Employees who have previously attained EMP status at lower grade levels

than that currently established as the entry grade level will retain that status, provided they continue to meet the requirements under which they qualified. Such individuals, however, will not be eligible for benefits applicable to EMP grade levels until they attain the entry grade level for EMP as defined above.

5-9. EMP obligations and benefits. a. Obligations of EMP employees are as follows:

(1) EMP employees are obligated to develop and improve their abilities and efficiency to the fullest extent practical in fulfillment of the purpose and principles of the program.

(2) EMP employees are obligated to accept transfer throughout the worldwide AAFES, except when the Commander, AAFES, determines that individual circumstances justify withdrawal of a proposed transfer. In the absence of such determination by the Commander, AAFES, the EMP status of an EMP employee who declines to accept a proposed transfer may be withdrawn by the Commander, AAFES, and the employee will be subject to separation based upon declination of transfer in accordance with paragraph 3-22.

(3) EMP employees who are in the entry EMP grade level or above are obligated to accept the terms of EMP early retirement.

b. Benefits to EMP employees are as follows:

(1) Retention priority in reduction in force (para. 4-12 through 4-16).

(2) Longer notice periods based on length of service in case of certain separations (app.).

(3) Triple indemnity accidental death benefit and supplementary life insurance benefits in accordance with the

AAFES Group Insurance Plan.

(4) For EMP employees in the entry EMP grade level and above only, supplemental retirement benefits and retention of personal grade, regardless of assignment, except as provided in paragraph 5-10h.

c. EMP status may be withdrawn by the Commander, AAFES as provided in a(2) above, or upon determination of unsatisfactory performance in accordance with paragraph 3-2, for gross inefficiency, insubordination, willful violation of laws, regulation, rules, or procedures or for conduct off the job reflecting discredit on AAFES.

d. The Commander, AAFES, may separate an EMP employee for gross inefficiency or for cause, as, appropriate. Gross inefficiency is defined in paragraph 3-7b and cause in paragraph 3-8. Gross inefficiency may exist even though an exchange has been operated in such a way as to generate acceptable returns. The existence of satisfactory performance ratings is not conclusive upon a charge of gross inefficiency, but may be taken into account in determination of this issue.

e. Requests for separation under d above will be submitted to the Commander, AAFES, by the appropriate AAFES headquarters office or division director containing a complete statement of charges against the employee. The Commander, AAFES, will refer the charges to an officer or civilian official for investigation. The officer or civilian official will thoroughly investigate the charges and recommend to the Commander, AAFES, approval or disapproval of the proposed separation, giving all supporting facts disclosed by the investigation.

5-10. EMP selection and promotion. a. The Commander, AAFES, will periodically review and establish, as considered necessary, the number and grade level of positions to be included in the EMP and make recommendations as appropriate

to the Board of Directors.

b. The EMP employee in the entry EMP grade level and above is granted a "personal grade" which does not fluctuate with nor depend on the position occupied (para 4-9).

c. Employees in the grade which is one grade below the entry EMP grade level and EMP employees in the entry EMP grade level and above, except those with personal grades of USP 15, may be promoted upon recommendation of a Central Promotion Board and approval by the Commander, AAFES. EMP employees with personal grade of USP 15 may be promoted upon recommendation of a Central Promotion Board and the Commander, AAFES, and approval by the Board of Directors.

d. The Commander, AAFES, will appoint Central Promotion Boards as appropriate to meet not less often than once each year. Central Promotion Boards will be composed of individuals senior to the grades under consideration for promotion. The boards will have a minimum of 5 members, and normally the chairman will be a senior field grade or general officer.

e. Central Promotion Boards will function as follows:

(1) Review pertinent records furnished by Personnel Division, Headquarters AAFES, of each employee who meets the criteria established by the Commander, AAFES.

(2) Identify and recommend for EMP status and/or promotion those employees who have demonstrated exceptional ability and have the greatest potential for performing successfully at the EMP grade level.

(3) Identify and recommend courses of action which will enable AAFES to more effectively develop any of the

executives under consideration. Recommend a course of action, as appropriate, concerning executives who have been identified through prescribed performance evaluation as marginal.

f. The Commander, AAFES, may approve or disapprove the recommendations of Central Promotion Boards.

g. No employee or new appointee will be granted an EMP grade without the approval of the Commander, AAFES.

h. Personal grades of EMP employees will be withdrawn upon -

(1) Loss of EMP status in accordance with paragraphs 5-9a (2) and 5-9c.

(2) Downgrade pursuant to e(3) above and paragraph 4-6b to a grade level below the entry EMP grade level.

STATEMENT

On or about July 2, 1962, respondent was first employed with the Army and Air Force Exchange Service ("AAFES") as a computer programmer. Thereafter, in and about 1967, respondent entered into a different employment contract with AAFES in a special program known as the Executive Management Program ("EMP").

According to the regulation of AAFES, and in particular AR60-21/AFR 147-15, c.5, Section II paragraphs 6-10 ("EMP Regulations"), Respondent was required to execute an employment contract in writing acknowledging and accepting the conditions of EMP. As an EMP employee, respondent had certain special obligations and special benefits as outlined in the EMP Regulations. In fact, the obligations of the EMP employees were substantially different, and more onerous than the obligations of other AAFES employees. These EMP

benefits and obligations are more particularly itemized in the complaint (¶ 5) and in the EMP Regulations.

On March 16, 1976, respondent, while an EMP employee of AAFES serving as shopping center manager for the Fort Jackson Exchange in South Carolina, received advance written notice of termination based upon conduct off the job that allegedly reflected discredit on AAFES and rendered respondent's retention incompatible with the best interests of AAFES. The written notice was received by Respondent immediately after Respondent pled guilty to four misdemeanor offenses of simple possession of illegal drugs. Respondent was subsequently terminated on April 19, 1976, and immediately pursued his administrative appeal.

During the administrative appeal, the hearing examiner for AAFES heard testimony and found, *inter alia*, from the evidence as follows (Complaint, ¶ 14):

1. Respondent's conduct off the job did not reflect discredit on AAFES; and

2. Respondent's retention in some capacity was not incompatible with the present interest of AAFES.

As a result of these findings, the hearing examiner made recommendations which included the following:

1. Respondent be reinstated with back pay to his former grade and transfered to an assignment outside the southeast exchange region; and

2. That failure of AAFES to accord an appellate review at a level above the Commander, AAFES, for Respondent, because of his EMP employment, subjected AAFES to criticism and possible legal action on a charge of lack of administrative due process; and

3. That if the Commander determines the recommendations inappropriate, that the matter be heard by the appellate authority of the Chairman, Army and Air Force Exchange and Motion Picture Service.

Despite the findings and recommendations of the hearing examiner of AAFES, Respondent's discharge was sustained by the Commander, AAFES. Thereafter, Respondent brought this action in the United States District Court for the Northern District of Texas, alleging that he had been denied a free and impartial appeal; had been denied procedural due process; that the decision to terminate Respondent was arbitrary, capricious, unsupported by substantial evidence, and an abuse of discretion; in excess of statutory authority; and contrary to Respondent's constitutional rights. Respondent sought, *inter alia*, monetary relief, employee benefits, and reinstatement.

The District Court dismissed the suit for lack of subject matter jurisdiction (Petitioner's Appendix B, 17a). Respondent timely appealed, and the Court of Appeals reversed and remanded. The Court of Appeals held that the District Court possessed subject matter jurisdiction to provide monetary relief under the Tucker Act, 28 U.S.C. §1346(a) (2), and to award non-monetary compensation from a confluence of 28 U.S.C. §1331(a) and 5 U.S.C. §702.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition for Writ of Certiorari because the decision of the Court of Appeals is in accord with the decision of this Court in *United States vs. Hopkins*, 427 U.S. 123 (1976) and is not contrary to the decision of this Court in *United States vs. Testan*, 424 U.S. 392 (1976).

As in the Statement, *supra*, the Court of Appeals bifurcated Respondent's claims for relief into two categories, to-wit:

award of non-monetary compensation, and monetary relief. As to the award of non-monetary compensation, the Court of Appeals held that the District Court possessed subject matter jurisdiction from the confluence of 28 U.S.C. §1331(a) and 5 U.S.C. §702. As a result of this holding, the court reversed the decision of the District Court and remanded the case for trial on the merits. Petitioner did not seek a review by this Court of that portion of the Court's decision; therefore, jurisdiction over Respondent's claims for non-monetary relief is not at issue before this Court.

As to Respondent's claims for monetary relief, the Court of Appeals held that the District Court possessed subject matter jurisdiction to hear the controversy pursuant to the Tucker Act, 28 U.S.C. §1346(a) (2). It is solely this portion of the decision of the Court of Appeals which Petitioner seeks review.

This Court's decision in ***United States v. Hopkins***, supra, is controlling over the instant case. Hopkins was discharged from his position as a civilian employee of the European Exchange System of AAFES for alleged acts of misconduct incompatible with continued employment. Hopkins brought suit in the United States Court of Claims to recover, ***inter alia***, back pay and appropriate allowances. His action was grounded on the claim that his separation was arbitrary and capricious, was a breach of his contract of employment, and was in violation of due process or prescribed regulations and procedures. The United States moved to have the petition dismissed for lack of jurisdiction. Before the Court of Claims, Hopkins argued that Exchange employees were not federal employees, therefore, his relationship with AAFES was contractual (the same as employees in the private sector). The United States, on the other hand, argued that Exchange personnel served by "appointment" rather than contract, and, therefore, the Tucker Act did not confer jurisdiction over his claim. The Court of Claims reaffirmed its earlier decision of ***Keetz v. United States***, 168 Ct.Cl. 205 (1964), holding that employees

of the Exchange Service are not employees of the United States. With this holding, the Court of Claims analogized the relationship between Hopkins and AAFES to the private sector, holding that the relationship was created by contract, either expressed or implied. In its decision, the Court of Claims recognized that its holding was in conflict with the recent decision of the Court of Appeals in ***Young v. United States***, 498 F. 2d 1211 (5 Cir., 1974). In ***Young***, the Court of Appeals held that the Tucker Act did not confer jurisdiction to hear exchange employee cases.

This Court granted certiorari to resolve the conflict between ***Hopkins*** and ***Young***. In ***Hopkins***, this Court held, contrary to the primary contentions of the government, that the Tucker Act applied to employment contracts. This Court stated at 427 U.S. 126:

> Since the statute (Tucker Act) applies, by its terms, to "any express or implied contract" we hold that it is applicable to employment contracts as well as to those for goods or other services.

The government alternatively contended (as it did before the Court of Claims) that AAFES employees did not have a contractual relationship with AAFES, but served by "appointment." This Court analyzed many of the regulations of AAFES and concluded that such an employee could be employed by virtue of a contract or by appointment. This Court, therefore, reversed and remanded the case for the threshhold determination of whether Hopkins was employed by virtue of a contract or served pursuant to appointment.

This Court stated at 427 U.S. 129:

> The Court of Claims, in reaching its conclusion that Plaintiff held his position by virtue of an expressed or implied contract, assumed that, once it was determined

he was not an appointed federal employee, this result followed as a matter of course. It concluded that, in such event, his employment status was governed by a series of cases from the private sector of the economy, holding that the typical employee-employer relationship was contractual in nature. While we do not question the relevance of these cases by way of analogy should Plaintiff be determined not to have been an appointee, we hold the Court of Claims erred in its threshhold determination that AAFES employees could never serve by appointment. Rather, the question depends upon an analysis of the statutes and regulations previously described *in light of whatever evidence is adduced on remand as to Plaintiff's particular status in this case.*

It is thus apparent that the question of whether Plaintiff was employed by virtue of a contract or by appointment is not susceptable of determination at this time. Rather, *the issue is one which must receive additional consideration from the Court of Claims after development of a fuller record* (emphasis added).

Also important for the instant case, is this Court's affirmation of the Court of Claims holding that Hopkins' complaint was sufficient under the Tucker Act to withstand the government's Motion to Dismiss on the grounds of lack of jurisdiction. This Court stated at 427 U.S. 130:

> Plaintiff's allegation that his discharge constituted a breach of contract of employment was sufficient, under the provisions of Pub. L. 91-350 (Tucker Act), to withstand the Government's Motion to Dismiss the Complaint on the grounds of lack of jurisdiction in the Court of Claims, and judgment of the court so holding is therefore affirmed.

In the instant case, as in *Hopkins*, there has been no evidentiary hearing of any type to shed light on whether Respondent was employed by virtue of a contract or by appointment. Until such evidentiary hearing is held in the District Court, this Court is unable to determine whether Respondent was employed by virtue of a contract or by appointment. Until such determination is made, the District Court possesses jurisdiction pursuant to the Tucker Act.

Although *Hopkins* was remanded, the Court of Claims never made the determination as to whether Hopkins was employed by virtue of a contract or by appointment, because the case was settled by the parties prior to the decision on remand. Respondent submits that, even if Hopkins had been found to serve by appointment, such decision would not be controlling in the instant case, as Respondent was employed by contract under the special program known as EMP.

Petitioner's contention that the instant case is controlled by this Court's decision in *United States v. Testan, supra*, is erroneous. *Testan* dealt with the claims of two civil service employees who contended that their positions of employment were erroneously classified, and, as a result, they were entitled to reclassification and back payment of salary which they would have received had they been properly classified. This Court stated at 424 U.S. 398:

> The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the act merely confers jurisdiction upon it whenever the substantive right exists. *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607 (1967).
>
> We therefore must determine whether the two other

> federal statutes (the Classification Act and the Back Pay Act) that are invoked by Respondents confer a substantive right to recover money damages from the United States for the period of their allegedly wrongful civil service classifications.

This Court decided that neither the Classification Act nor the Back Pay Act conferred a substantive right for Respondents to sue the United States for monetary damages, and since the Tucker Act was merely jurisdictional, Respondents' claims were denied. The employees argued that the Tucker Act fundamentally waived sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation. In response, this Court stated, at 424 U.S. 400:

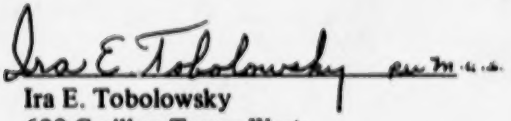
> The argument does not persuade us. As stated above, the Tucker Act is merely jurisdictional, and grant of right of action must be made with specificity. ***The Respondents do not rest their claims upon a contract;*** . . . . (emphasis added).

It is implicit in the Court's decision that, had the employees rested their claim upon a contract, they would have had a substantive right for breach of contract, and, along with that right, a right to sue the United States for monetary damages with jurisdiction being provided by the Tucker Act.

SUMMARY

In conclusion, based on the foregoing authorities, this Court should deny the Petition for Writ of Certiorari, as the instant case is in accord with *United States v. Hopkins, supra,* and not contrary to *United States v. Testan, supra.* Furthermore, the law is well settled that the Tucker Act contains an immunity waiver which vests the District Court with jurisdiction to render judgment not exceeding $10,000 in amount, upon any claim against the United States founded upon any express or implied contract. See also *Hatzlachh Supply Co., Inc. v. United States,* 444 U.S. 460 (1980).

Respectfully submitted,
TOBOLOWSKY & FRIEDMAN



Ira E. Tobolowsky
600 Carillon Tower West
13601 Preston Rd.
Dallas, Texas 75240
214/233-0444

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on the following counsel of record in this case at the addresses shown by placing same in the United States Mail, postage prepaid, on this the 9th day of July, 1981:

Mr. Wade H. McCree, Jr.
Office of the Solicitor General
Washington, D. C. 20530

Mr. Thomas S. Martin
Mr. Elliott Schulder
Mr. William Kanter
Ms. Eloise E. Davies
Department of Justice
Washington, D. C. 20530

Ira E. Tobolowsky